

State of Utah  
Administrative Rule Analysis

## NOTICE OF PROPOSED RULE

- \* The agency identified below in box 1 provides notice of proposed rule change pursuant to Utah Code Section 63G-3-301.
- \* Please address questions regarding information on this notice to the agency.
- \* The full text of all rule filings is published in the Utah State Bulletin unless excluded because of space constraints.
- \* The full text of all rule filings may also be inspected at the Division of Administrative Rules.

DAR file no:		Date filed:	
State Admin Rule Filing Id:		Time filed:	
	<b>Agency No.</b>	<b>Rule No.</b>	<b>Section No.</b>
<b>Utah Admin. Code Ref (R no.):</b>	<b>R</b> 156	-	1 102
<b>Changed to Admin. Code Ref. (R no.):</b>	<b>R</b>	-	

<b>1.</b>	<b>Agency:</b>	Commerce/Division of Occupational and Professional Licensing		
	<b>Room no.:</b>			
	<b>Building:</b>	Heber M. Wells Building		
	<b>Street address 1:</b>	160 East 300 South		
	<b>Street address 2:</b>			
	<b>City, state, zip:</b>	Salt Lake City UT 84111-2316		
	<b>Mailing address 1:</b>	PO Box 146741		
	<b>Mailing address 2:</b>			
	<b>City, state, zip:</b>	Salt Lake City UT 84114-6741		
	<b>Contact person(s):</b>			
	<b>Name:</b>	<b>Phone:</b>	<b>Fax:</b>	<b>E-mail:</b>
	W. Ray Walker	801-530-6256	801-530-6511	raywalker@utah.gov

(Interested persons may inspect this filing at the above address or at the Division of Administrative Rules during business hours)

<b>2.</b>	<b>Title of rule or section (catchline):</b>
	Definitions
<b>3.</b>	<b>Type of notice:</b>
	New ____; Amendment XX; Repeal ____; Repeal and Reenact ____
<b>4.</b>	<b>Purpose of the rule or reason for the change:</b>
	The Division needs to clarify the type of evidence that may not be considered as a mitigating circumstance in informal disciplinary proceedings brought on the basis of findings or sanctions issued in a prior criminal case or disciplinary action.
<b>5.</b>	<b>This change is a response to comments from the Administrative Rules Review Committee.</b>
	No XXX; Yes ____
<b>6.</b>	<b>Summary of the rule or change:</b>
	In paragraph (16), the definition of "mitigating circumstances" is expanded to specify the arguments and evidence that may not be considered in an informal disciplinary proceeding brought on the basis of a prior criminal case or disciplinary action (a proceeding referred to as "reciprocal discipline" by the Division). Well-established case law prohibits the relitigation of the prior case. The proposed rule amendments codify this case law by specifying that procedural and evidentiary arguments regarding the fairness, appropriateness, or validity of a prior proceeding may not be considered as establishing a mitigating circumstance.
<b>7.</b>	<b>Aggregate anticipated cost or savings to:</b>

	<b>A) State budget:</b>		
	<b>Affected:</b>	No ____; Yes XXX	
	The Division will incur minimal costs of approximately \$100 to print and distribute the rule once the proposed amendments are made effective. Any costs incurred will be absorbed in the Division's current budget. It is also anticipated that the state will experience a savings in the form of increased efficiency in adjudicating reciprocal discipline matters. The proposed amendments will focus these informal proceedings on the relevant issues, relieving the state's counsel from having to file briefs and engage in oral argument on a case-by-case basis whenever a respondent attempts to relitigate a prior proceeding.		
	<b>B) Local government:</b>		
	<b>Affected:</b>	No XXX; Yes ____	
	Local government is not required to comply with or enforce this administrative rule. Therefore, no fiscal impact to local government is anticipated.		
	<b>C) Small businesses ("small business" means a business employing fewer than 50 persons):</b>		
	<b>Affected:</b>	No ____; Yes XXX	
	A small business that is named as a respondent in a reciprocal discipline proceeding should experience a cost savings insofar as the rule amendments will help the business focus its defense on relevant matters, rather than going to the expense and trouble of briefing arguments that, pursuant to well-established case law, may not be considered. The Division, however, is not able to quantify an exact amount of cost savings due to varying factors.		
	<b>D) Persons other than small businesses, businesses, or local government entities ("person" means any individual, partnership, corporation, association, governmental entity, or public or private organization of any character other than an agency):</b>		
	<b>Affected:</b>	No ____; Yes XXX	
	An affected person who is named as a respondent in a reciprocal discipline proceeding should experience a cost savings insofar as the rule amendments will help the person focus its defense on relevant matters, rather than going to the expense and trouble of briefing arguments that, pursuant to a well-established case law, may not be considered. The Division, however, is not able to quantify an exact amount of cost savings due to varying factors.		
8.	<b>Compliance costs for affected persons:</b>		
	To comply, affected persons must focus their arguments in a reciprocal discipline case on relevant issues. There are no costs beyond those normally associated with preparing a case for hearing.		
9.	<b>A) Comments by the department head on the fiscal impact the rule may have on businesses:</b>		
	As stated in the rule analysis, the proposed filing codifies the existing case law that prohibits a respondent from relitigating a prior criminal case or disciplinary action before a licensing board. It is possible that affected businesses will experience reduced litigation expenses by complying with the rule and properly focusing their defense at the outset of an administrative disciplinary case.		
	<b>B) Name and title of department head commenting on the fiscal impacts:</b>		
	Francine A. Giani, Executive Director		
10.	<b>This rule change is authorized or mandated by state law, and implements or interprets the following state and federal laws.</b>		
	<b>State code or constitution citations (required)</b> (e.g., Section 63G-3-402; Subsection 63G-3-601(3); Article IV) :		
	Subsection 58-1-106(1)(a)	Section 58-1-308	
	Subsection 58-1-501(4)		
11.	<b>This rule adds, updates, or removes the following title of materials incorporated by references</b> (a copy of materials incorporated by reference must be submitted to the Division of Administrative Rules; <i>if none, leave blank</i> ):		
		<b>First Incorporation</b>	<b>Second Incorporation</b>
	<b>Official Title of Materials Incorporated (from title page)</b>		
	<b>Publisher</b>		
	<b>Date Issued</b>		
	<b>Issue, or version</b>		

	<b>ISBN Number (optional)</b>		
	<b>ISSN Number (optional)</b>		
	<b>Cost of Incorporated Reference</b>		
	<b>Action: Adds, updates, or removes</b>		
	(If this rule incorporates more than two items by reference, please attach additional pages)		
<b>12.</b>	<b>The public may submit written or oral comments to the agency identified in box 1.</b> (The public may also request a hearing by submitting a written request to the agency. The agency is required to hold a hearing if it receives requests from ten interested persons or from an association having not fewer than ten members. Additionally, the request must be received by the agency not more than 15 days after the publication of this rule in the <i>Utah State Bulletin</i> . See Section 63G-3-302 and Rule R15-1 for more information.)		
	<b>A) Comments will be accepted until 5:00 p.m. on (mm/dd/yyyy):</b>	03/04/2013	
	<b>B) A public hearing (optional) will be held:</b>		
	<b>On (mm/dd/yyyy):</b>	<b>At (hh:mm AM/PM):</b>	<b>At (place):</b>
<b>13.</b>	<b>This rule change may become effective on (mm/dd/yyyy):</b>		03/11/2013
	NOTE: The date above is the date on which this rule MAY become effective. It is NOT the effective date. After the date designated in Box 12(A) above, the agency must submit a Notice of Effective Date to the Division of Administrative Rules to make this rule effective. Failure to submit a Notice of Effective Date will result in this rule lapsing and will require the agency to start the rulemaking process over.		
<b>14.</b>	<b>Indexing information -- keywords</b> (maximum of four, in lower case, except for acronyms (e.g., "GRAMA") or proper nouns (e.g., "Medicaid")); may not include the name of the agency:		
	diversion programs	licensing	
	supervision	evidentiary restrictions	
<b>15.</b>	<b>Attach an RTF document containing the text of this rule change (filename):</b>		R156-1.pro
<b>To the agency:</b> Information requested on this form is required by Sections 63G-3-301, 302, 303, and 402. Incomplete forms will be returned to the agency for completion, possibly delaying publication in the <i>Utah State Bulletin</i> , and delaying the first possible effective date.			
<b>AGENCY AUTHORIZATION</b>			
<b>Agency head or designee, and title:</b>	Mark B. Steinagel, Director	<b>Date (mm/dd/yyyy):</b>	01/11/2013

**R156. Commerce, Occupational and Professional Licensing.**

**R156-1. General Rule of the Division of Occupational and Professional Licensing.**

**R156-1-102. Definitions.**

In addition to the definitions in Title 58, as used in Title 58 or this rule:

(1) "Active and in good standing" means a licensure status which allows the licensee full privileges to engage in the practice of the occupation or profession subject to the scope of the licensee's license classification.

(2) "Aggravating circumstances" means any consideration or factors that may justify an increase in the severity of an action to be imposed upon an applicant or licensee. Aggravating circumstances include:

(a) prior record of disciplinary action, unlawful conduct, or unprofessional conduct;

(b) dishonest or selfish motive;

(c) pattern of misconduct;

(d) multiple offenses;

(e) obstruction of the disciplinary process by intentionally failing to comply with rules or orders of the Division;

(f) submission of false evidence, false statements or other deceptive practices during the disciplinary process including creating, destroying or altering records after an investigation has begun;

(g) refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the Division;

(h) vulnerability of the victim;

(i) lack of good faith to make restitution or to rectify the consequences of the misconduct involved;

(j) illegal conduct, including the use of controlled substances; and

(k) intimidation or threats of withholding clients' records or other detrimental consequences if the client reports or testifies regarding the unprofessional or unlawful conduct.

(3) "Cancel" or "cancellation" means nondisciplinary action by the Division to rescind, repeal, annul, or void a license issued in error. Such action includes rescinding a license issued to an applicant whose payment of the required application fee is dishonored when presented for payment, or who has been issued a conditional license pending a criminal background check and the check cannot be completed due to the applicant's failure to resolve an outstanding warrant or to submit acceptable fingerprint cards.

(4) "Charges" means the acts or omissions alleged to constitute either unprofessional or unlawful conduct or both by a licensee, which serve as the basis to consider a licensee for inclusion in the diversion program authorized in Section 58-1-404.

(5) "Denial of licensure" means action by the Division refusing to issue a license to an applicant for initial licensure, renewal of licensure, reinstatement of licensure or relicensure.

(6) (a) "Disciplinary action" means adverse licensure action by the Division under the authority of Subsections 58-1-401(2) (a) through (2) (b).

(b) "Disciplinary action", as used in Subsection 58-1-401(5), shall not be construed to mean an adverse licensure action taken in response to an application for licensure. Rather, as used in Subsection 58-1-401(5), it shall be construed to mean an adverse action initiated by the Division.

(7) "Diversion agreement" means a formal written agreement between a licensee, the Division, and a diversion committee, outlining the terms and conditions with which a licensee must comply as a condition of entering in and remaining under the diversion program authorized in Section 58-1-404.

(8) "Diversion committees" mean diversion advisory committees authorized by Subsection 58-1-404(2) (a) (i) and created under Subsection R156-1-404a.

(9) "Duplicate license" means a license reissued to replace a license which has been lost, stolen, or mutilated.

(10) "Emergency review committees" mean emergency adjudicative proceedings review committees created by the Division under the authority of Subsection 58-1-108(2).

(11) "Expire" or "expiration" means the automatic termination of a license which occurs:

(a) at the expiration date shown upon a license if the licensee fails to renew the license before the expiration date; or

(b) prior to the expiration date shown on the license:

(i) upon the death of a licensee who is a natural person;

(ii) upon the dissolution of a licensee who is a partnership, corporation, or other business entity; or

(iii) upon the issuance of a new license which supersedes an old license, including a license which:

(A) replaces a temporary license;

(B) replaces a student or other interim license which is limited to one or more renewals or other renewal limitation; or

(C) is issued to a licensee in an upgraded classification permitting the licensee to engage in a broader scope of practice in the licensed occupation or profession.

(12) "Inactive" or "inactivation" means action by the Division to place a license on inactive status in accordance with Sections 58-1-305 and R156-1-305.

(13) "Investigative subpoena authority" means, except as otherwise specified in writing by the director, the Division regulatory and compliance officer, or if the Division regulatory and compliance officer is unable to so serve for any reason, a Department administrative law judge, or if both the Division regulatory and compliance officer and a Department administrative law judge are unable to so serve for any reason, an alternate designated by the director in writing.

(14) "License" means a right or privilege to engage in the practice of a regulated occupation or profession as a licensee.

(15) "Limit" or "limitation" means nondisciplinary action placing

either terms and conditions or restrictions or both upon a license:

(a) issued to an applicant for initial licensure, renewal or reinstatement of licensure, or relicensure; or

(b) issued to a licensee in place of the licensee's current license or disciplinary status.

(16) "Mitigating circumstances" means any consideration or factors that may justify a reduction in the severity of an action to be imposed upon an applicant or licensee.

(a) Mitigating circumstances include:

(i) absence of prior record of disciplinary action, unlawful conduct or unprofessional conduct;

(ii) personal, mental or emotional problems provided such problems have not posed a risk to the health, safety or welfare of the public or clients served such as drug or alcohol abuse while engaged in work situations or similar situations where the licensee or applicant should know that they should refrain from engaging in activities that may pose such a risk;

(iii) timely and good faith effort to make restitution or rectify the consequences of the misconduct involved;

(iv) full and free disclosure to the client or Division prior to the discovery of any misconduct;

(v) inexperience in the practice of the occupation and profession provided such inexperience is not the result of failure to obtain appropriate education or consultation that the applicant or licensee should have known they should obtain prior to beginning work on a particular matter;

(vi) imposition of other penalties or sanctions if the other penalties and sanctions have alleviated threats to the public health, safety, and welfare; and

(viii) remorse.

(b) The following factors [~~should~~ may] not be considered as mitigating circumstances:

(i) forced or compelled restitution;

(ii) withdrawal of complaint by client or other affected persons;

(iii) resignation prior to disciplinary proceedings;

(iv) failure of injured client to complain; [~~and~~]

(v) complainant's recommendation as to sanction; and

(vi) in an informal disciplinary proceeding brought pursuant to Subsection 58-1-501(2)(c) or (d) or Subsections R156-1-501(1) through (5):

(A) argument that a prior proceeding was conducted unfairly, contrary to law, or in violation of due process or any other procedural safeguard;

(B) argument that a prior finding or sanction was contrary to the evidence or entered without due consideration of relevant evidence;

(C) argument that a respondent was not adequately represented by counsel in a prior proceeding; and

(D) argument or evidence that former statements of a respondent made

in conjunction with a plea or settlement agreement are not, in fact, true.

(17) "Nondisciplinary action" means adverse licensure action by the Division under the authority of Subsections 58-1-401(1) or 58-1-401(2) (c) through (2) (d).

(18) "Peer committees" mean advisory peer committees to boards created by the legislature in Title 58 or by the Division under the authority of Subsection 58-1-203(1) (f).

(19) "Probation" means disciplinary action placing terms and conditions upon a license;

(a) issued to an applicant for initial licensure, renewal or reinstatement of licensure, or relicensure; or

(b) issued to a licensee in place of the licensee's current license or disciplinary status.

(20) "Public reprimand" means disciplinary action to formally reprove or censure a licensee for unprofessional or unlawful conduct, with the documentation of the action being classified as a public record.

(21) "Regulatory authority" as used in Subsection 58-1-501(2) (d) means any governmental entity who licenses, certifies, registers, or otherwise regulates persons subject to its jurisdiction, or who grants the right to practice before or otherwise do business with the governmental entity.

(22) "Reinstate" or "reinstatement" means to activate an expired license or to restore a license which is restricted, as defined in Subsection (26) (b), or is suspended, or placed on probation, to a lesser restrictive license or an active in good standing license.

(23) "Relicense" or "relicensure" means to license an applicant who has previously been revoked or has previously surrendered a license.

(24) "Remove or modify restrictions" means to remove or modify restrictions, as defined in Subsection (25) (a), placed on a license issued to an applicant for licensure.

(25) "Restrict" or "restriction" means disciplinary action qualifying or limiting the scope of a license:

(a) issued to an applicant for initial licensure, renewal or reinstatement of licensure, or relicensure in accordance with Section 58-1-304; or

(b) issued to a licensee in place of the licensee's current license or disciplinary status.

(26) "Revoke" or "revocation" means disciplinary action by the Division extinguishing a license.

(27) "Suspend" or "suspension" means disciplinary action by the Division removing the right to use a license for a period of time or indefinitely as indicated in the disciplinary order, with the possibility of subsequent reinstatement of the right to use the license.

(28) "Surrender" means voluntary action by a licensee giving back or returning to the Division in accordance with Section 58-1-306, all rights and privileges associated with a license issued to the licensee.

(29) "Temporary license" or "temporary licensure" means a license

issued by the Division on a temporary basis to an applicant for initial licensure, renewal or reinstatement of licensure, or relicensure in accordance with Section 58-1-303.

(30) "Unprofessional conduct" as defined in Title 58 is further defined, in accordance with Subsection 58-1-203(1) (e), in Section R156-1-502.

(31) "Warning or final disposition letters which do not constitute disciplinary action" as used in Subsection 58-1-108(3) mean letters which do not contain findings of fact or conclusions of law and do not constitute a reprimand, but which may address any or all of the following:

- (a) Division concerns;
- (b) allegations upon which those concerns are based;
- (c) potential for administrative or judicial action; and
- (d) disposition of Division concerns.

**KEY: diversion programs, licensing, [~~occupational licensing,~~]  
supervision, evidentiary restrictions**

**Date of Enactment or Last Substantive Amendment: [~~November 26, 2012~~]2013**

**Notice of Continuation: January 5, 2012**

**Authorizing, and Implemented or Interpreted Law: 58-1-106(1) (a); 58-1-308; 58-1-501(4)**